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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIKE LOGAN JOHNSON,

Defendant and Appellant.

F045564

(Super. Ct. No. F02671627-8)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez, Judge.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, Kathleen A. McKenna and Lloyd G. Carter, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted defendant of rape of an incompetent person (Pen. Code,[1] § 261, subd. (a)(1); count 1), sexual battery on an institutionalized person (§ 243.4, subd. (b); count 3), and misdemeanor elder or dependent adult abuse (§ 368, subd. (c); count 4). The jury deadlocked on a count of forcible rape (§ 261, subd. (a)(1); count 2). The court sentenced defendant to a total prison term of six years.

On appeal, defendant contends the court erred in allowing the prosecution's medical expert to testify that, in his opinion, the victim was incapable of giving legal consent to sexual intercourse. We conclude that, although the expert's opinion improperly stated a legal conclusion, defendant suffered no prejudice. Accordingly, we affirm the judgment.

FACTS

The victim in this case was Dolores,[2] a 53-year-old woman suffering from Huntington's chorea. The disease, with which she was first diagnosed in the early 1990's, caused Dolores to suffer uncontrollable, spastic bodily movements, as well as dementia and speech impairment. Dolores eventually became unable to care for herself and, in June of 2000, was admitted into a convalescent hospital (the Hospital). Defendant worked at the Hospital as a certified nursing assistant (CNA) and helped care for Dolores.

Dolores was a "total care" patient, requiring all her basic needs be tended to by others, including bathing, dressing, eating, and having her diapers changed. Due to instability when she walked, Dolores used a wheelchair. She sometimes exhibited impulsive behavior such as rolling her wheelchair rapidly and then throwing herself onto her bed. She was fitted with a personal alarm and sometimes wore a helmet to protect her head in case she fell.

Eileen Watson, a CNA who helped care for Dolores at the Hospital, testified that, once or twice during her shift, she would have to shower Dolores because of Dolores's

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[1] Further statutory references are to the Penal Code unless otherwise specified.

[2] First names are used where appropriate to protect the victim's privacy.

bowel movements. According to Watson, Dolores would frequently remove her bowel movement from her diaper and "get it all over herself, her bed, the walls, her hair." Dolores never made any inappropriate sexual comments, but she would sometimes put her fingers in her vaginal area. Watson thought this activity was sexual in nature because, when she would ask Dolores what she was doing, Dolores would just laugh. Watson further testified that Dolores would sometimes make up stories, like saying there was a man in the room even when there was not. Because of Dolores's mental capacity, Watson thought Dolores could have truly believed someone was standing in the room and was therefore not necessarily lying about it.

The allegations giving rise to this case were first made by Dolores on May 8, 2001. On that date, her 32-year-old daughter, Veronica, came to visit her at the Hospital. As Veronica was giving her mother a manicure and pedicure, she casually asked whether defendant was still working at the hospital. Dolores said "yes," paused, and then said "unfortunately." Veronica found this unusual because Dolores did not use big words like that. Veronica pressed Dolores to explain. Dolores answered, "[he] screws me, he screws me." When further pressed, Dolores stated "with his penis, penis, penis." Dolores then stated that it happened in the shower, "[a]ll the time, every time."

Veronica reported these allegations to the charge nurse, Jane Hankins, who came to Dolores's room and conducted a brief, visual examination. She did not observe any visible injuries. Dolores told Hankins, "I hate Mike, I hate Mike. Mike screwed me." When she said this, she pointed to her vaginal area. Dolores later repeated similar allegations to a police officer and other health care professionals who were investigating the allegations.

On May 9, 2001, Veronica took Dolores to University Medical Center for a rape kit examination. Roberta Stillwell, the nurse who performed the examination, found white fluid in the vaginal vault and prepared slides. Later forensics testing revealed that the vaginal swab taken from Dolores contained sperm, and defendant's blood DNA sample matched the genetic traits of the sperm.

Watson and Cheri Carlton, another CNA, both confirmed that defendant took Dolores to the shower sometime during the morning of May 8, 2001, though they did not directly observe defendant bathing her. Defendant told Watson that Dolores needed a shower because she had a bowel movement. Defendant told police officer Randy Gens on May 8, 2001, that he had assisted Dolores twice that morning. After breakfast he helped her use the restroom. Defendant said Dolores could wipe herself but needed him to help her change her briefs. Defendant also had to do a "P-E-R-I cure" which involved cleaning Dolores's private areas.

Rhonda Papenhausen worked at the Hospital as a licensed vocational nurse (LVN). Papenhausen testified that, around the end of January or beginning of February of 2001, she was working the night shift when she heard Dolores screaming. Papenhausen pushed back the curtain which hung around Dolores's bed. She saw defendant and Dolores lying side-by-side on the bed. Defendant was adjusting his belt buckle and zipper. Defendant did not offer any explanation for what he was doing. Papenhausen, who was the charge nurse that night, testified that she just told defendant to leave the room but did not tell him to go home that night. Papenhausen claimed she reported the incident the next day to her director of nurses, Tobey Bonaker.

Dr. Adam Rosenblatt, an assistant professor of psychiatry at Johns Hopkins School of Medicine in Baltimore, Maryland, was called as an expert witness for the prosecution. Dr. Rosenblatt was the director of clinical enterprises at the Baltimore Huntington's Disease Center. Over half of his practice involved the study and treatment of patients with Huntington's disease, and he sees several hundred such patients each year.

In his testimony, Dr. Rosenblatt described the physical and mental effects of Huntington's disease. He defined it as a hereditary disorder with three basic components: (1) movement disorder, characterized by involuntary, jerking movements, (2) mental problems, including dementia and impairment to the ability to think, reason, and

remember things, and (3) psychiatric problems, including depression, irritability, obsessive behavior, and loss of usual inhibitions.

Prior to testifying, Dr. Rosenblatt spoke to Dolores and reviewed all her medical records. He also viewed the videotape of Dolores's deposition in a separate civil case against the Hospital, and the depositions of people who had evaluated and cared for Dolores.

When he spoke to her, Dolores's ability to communicate was "extremely limited" and she could "produce almost no intelligible speech." Dr. Rosenblatt described Dolores as having advanced Huntington's but not end stage or terminal stage. Dr. Rosenblatt opined that Dolores's mental state as of May 8, 2001, would have been "moderate dementia, very clearly abnormal."

In response to hypothetical questions, Dr. Rosenblatt opined that if Dolores wanted to engage in sexual intercourse, she would not have understood sex usually takes place in the context of a relationship. Nor would she have understood the possible consequences of the act, including sexually transmitted diseases, physical injury, a compromised relationship with people who were supposed to be taking care of her, and damage to her family's well-being. Dr. Rosenblatt further opined that, if there was an act of sexual intercourse, it would not have involved an act of free will, "given the amount of dementia she had, given the amount of disinhibition and poor decision-making ability, given her stage of Huntington's disease …."

Several objections followed this testimony and were discussed outside the presence of the jury. Defense counsel stated she would ask for a pinpoint instruction on the consent issue, and said: "Why don't we just ask Dr. Rosenblatt did she have the capacity to consent on May 8th? Why don't we just cut to the chase?"

When the jury returned, the following colloquy, which is the subject of this appeal, occurred:

> "[PROSECUTOR]: Q. Doctor, I think I'm just gonna cut to the chase here. As of May 8th, 2001 do you believe that Dolores was capable of giving legal consent to sex assuming that she had desired to do so?

"[DR. ROSENBLATT:] A. Absolutely not.

"[PROSECUTOR:] Q. Why is that?

"[DEFENSE COUNSEL]: Your Honor, I'm gonna object to the form of the question and request to strike the answer.

"THE COURT: The objection is overruled."

Dr. Rosenblatt based his opinion on Dolores's "dementia, her stage of Huntington's disease, her demonstrated difficulty with decision-making and disinhibition."

The defense

Tobey Bonaker, a registered nurse, was working at the Hospital in 2001. Bonaker denied that Papenhausen reported to her an incident involving Dolores and defendant in January or February 2001.

William Gilio worked as a CNA at the Hospital in 2001 and helped care for Dolores. At some point, Dolores made what he felt was an inappropriate sexual comment to him. Specifically, she said "Screw me." When she said it, Gilio reacted by leaving the room. Gilio reported the incident to the charge nurse.

Nancy Stillwell, an LVN charge nurse, was on duty on May 8 and 9, 2001. When the allegation against defendant was made, Hankins asked her to go down to Dolores's room with her. Stillwell watched while Hankins did a quick physical examination of Dolores. At some point during the examination, Stillwell heard Dolores say "Mike screwed me." Dolores did not say when or where this happened or use the word "rape." When Hankins was asking Dolores questions, Dolores said "no" when she was asked whether she was afraid.

About 30 minutes after Hankins examined Dolores, Stillwell went back to check on her and make sure everything was alright. Dolores was lying down and going to sleep.

Subsequently, Stillwell never heard Dolores make any further statements about defendant or the incident. Staff would ask Dolores on a daily basis whether she felt

secure and comfortable, and Dolores would respond by saying she was okay. Dolores would say the word "sex" a lot, especially when she was watching Jerry Springer.

Stillwell testified she could understand Dolores 75 percent of the time. As to defendant, Stillwell testified she did not have any concerns about him and that she had never observed any inappropriate behavior between him and the female residents. According to Stillwell, Dolores liked defendant. When asked how she could be so positive, Stillwell explained: "If she didn't like you, you would know, you know. She would be more aggressive toward the caregivers and angry with them, but she was always smiling and pleasant with [defendant] and a few other employees."

Dr. Avak Howsepian testified as an expert for the defense. He was a staff psychiatrist at the Veterans Administration Medical Center in Fresno. He was also an adjunct professor in psychiatry, training and supervising residents and medical students from the University of California, San Francisco, both on the San Francisco campus and the Fresno campus. In his clinical practice, he treated roughly 50 patients per week, and supervised two residents per week.

Dr. Howsepian testified he was familiar with Huntington's disease through his exposure in medical school, his residency training, and in his practice after residency, during which he has cared for patients with Huntington's disease. At the time of trial, he had two Huntington's patients and had seen four or five such patients over the course of his practice in Fresno. Dr. Howsepian frequently lectured on the issue of consent in the context of getting a patient's informed consent to medications and procedures. He had also served as a consulting psychiatrist in situations where patients were refusing medical treatment, and he helped to evaluate their capacity to consent. Dr. Howsepian explained the different elements of consent, including adequate information, lack of coercion, and decisional capacity, which included the ability to understand one's choices, the ability to choose one of the options, and the ability to express that choice to someone.

Dr. Howsepian presented detailed testimony on the requisite components for a diagnosis of dementia and concluded that the medical professionals who diagnosed

Dolores as suffering from dementia did not adequately assess whether all the components were present. Thus, he opined the data from Dolores's records was insufficient to justify a finding she suffered from dementia. Similarly, Dr. Howsepian opined there was nothing in Dolores's medical records suggesting "she did not have the capacity to consent to sex at that time" and thus he had to "presume that she could [give consent], given the cannons [*sic*] of how we evaluate consent."

Rebuttal

Dr. Robert Calmes, a neurologist, was called as a rebuttal witness. Dr. Calmes testified he had treated between 20 and 50 patients with Huntington's disease. Dr. Calmes treated Dolores between 1990 and 2000.

When he first started treating Dolores, she was experiencing difficulty with her memory and thinking. After conducting a formal assessment, Dr. Calmes concluded that Dolores had mild dementia in 1991. By 2000, Dolores had moderate dementia, meaning she was suffering from the loss of recent memory and having difficulty thinking clearly.

DISCUSSION

Defendant's sole contention on appeal is that the court erroneously allowed Dr. Rosenblatt to testify that, in his opinion, Dolores was incapable of giving legal consent to sexual intercourse. Defendant argues Dr. Rosenblatt's testimony amounted to an improper opinion concerning how he believed the case should be decided and that it usurped the fact-finding function of the jury. The People disagree, claiming the opinion was permissible on an ultimate issue of fact but, even if the testimony was improper, the error was harmless.

Generally speaking, a witness may testify only about matters of which he or she has personal knowledge. (Evid. Code, § 702, subd. (a).) Opinion testimony is generally inadmissible at trial but may be admitted in circumstances where it will assist the jury to understand the evidence or a concept beyond common experience. Expert opinion is admissible if it is "[r]elated to a subject that is sufficiently beyond common experience … [and] would assist the trier of fact." (Evid. Code, § 801, subd. (a).) "Expert opinion is

not admissible if it consists of inferences and conclusions which can be drawn as easily and intelligently by the trier of fact as by the witness." (*People v. Torres* (1995) 33 Cal.App.4th 37, 45.)

It is settled that a witness may not express an opinion as to the definition of a crime or a question of law because it is the duty of the trial court, not the witness, to instruct the jury as to what constitutes an offense. (*People v. Torres*, *supra*, 33 Cal.App.4th at pp. 45-46 [definition of crime]; *Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1179-1181 [question of law].) Moreover, as the Court of Appeal explained:

> "Even if an expert's opinion does not go to a question of law, it is not admissible if it invades the province of the jury to decide a case. 'Undoubtedly there is a kind of statement by the witness which amounts to no more than an expression of his general belief as to how the case should be decided …. It is believed all courts would exclude such extreme expressions. There is no necessity for this kind of evidence; to receive it would tend to suggest that the judge and jury may shift responsibility for decision to the witnesses; and in any event it is wholly without value to the trier of fact in reaching a decision.' [Citation.] Notwithstanding Evidence Code section 805,**[3]** an 'expert must not usurp the function of the jury ….' [Citations.] [¶] Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). '[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." [Citation.]' [Citations.] In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Summers v. A.L. Gilbert Co.*, *supra*, at pp. 1182-1183.)

In keeping with the foregoing, a witness may not express an opinion as to a defendant's guilt or innocence, or with respect to whether a crime has been committed. (*People v. Torres*, *supra*, 33 Cal.App.4th at pp. 46-47.) Nonetheless, "there are some

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3Evidence Code section 805 provides: "Testimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact."

crimes a jury could not determine had occurred without the assistance of expert opinion as to an *element* of the crime.[4]" (*Torres*, at p. 47.) Thus, for example, it has been held proper for a trial court to permit an expert in the illegal distribution of pharmaceutical drugs to opine that, under the facts of the hypothetical question posed to him, the drugs were possessed for the purpose of illegal street sales. (*People v. Doss* (1992) 4 Cal.App.4th 1585, 1596.)

Here, count 1 charged defendant with violating section 261, subdivision (a)(1), which provides:

> "Rape is an act of sexual intercourse accomplished with a person not the spouse of the perpetrator, under any of the following circumstances: [¶] … Where a person is incapable, because of a mental disorder or developmental or physical disability, of giving legal consent, and this is known or reasonably should be known to the person committing the act. Notwithstanding the existence of a conservatorship pursuant to the provisions of the Lanterman-Petris-Short Act (Part 1 (commencing with Section 5000) of Division 5 of the Welfare and Institutions Code), the prosecuting attorney shall prove, as an element of the crime, that a mental disorder or developmental or physical disability rendered the alleged victim incapable of giving consent."

Under this provision, proof that the victim did not consent to the sex act is not required. (*People v. Giardino* (2000) 82 Cal.App.4th 454, 462.) Instead, the People have the burden to prove that the victim was not "capable of exercising the degree of judgment a

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[4] "For example, in cases charging rape of a person who, through mental disorder, is incapable of giving consent (Pen. Code § 261, subd. (a)(1)), expert testimony is admissible to establish a necessary element of the crime—that the victim was incapable of giving consent due to a mental disorder. (*People v. Lewis* (1977) 75 Cal.App.3d 513, 518-519; *People v. Dolly* (1966) 239 Cal.App.2d 143, 145-146.)" We note the issue in *Lewis* and *Dolly* was sufficiency of the evidence, not admissibility of expert opinion evidence. Unlike this case, the doctor and psychologist in *Lewis* and *Dolly* did not directly opine that the victims were incapable of giving legal consent to sexual intercourse. Rather, the doctor in *Lewis* testified the victim, a 65-year-old bedridden woman suffering from Huntington's chorea, "'could not perceive exactly the nature of the situation in which she was placed.… In other words, she did not have the understanding what exactly was going on around her.'" (*People v. Lewis*, *supra*, at p. 519.) The psychologist in *Dolly* opined, based on intelligence testing, that the 20-year-old victim had a "'mental age somewhere between eight years and five months, and nine years and nine months.'" (*People v. Dolly*, *supra*, at pp. 145-146.)

person must have in order to give legally cognizable consent." (*Ibid.*) "*People v. Griffin* (1897) 117 Cal. 583, 585, still states the correct test: '[Legal] consent presupposes an intelligence capable of understanding the act, its nature, and possible consequences.'" [5] (*People v. Lewis, supra*, 75 Cal.App.3d at p. 519.)

Applying the above authorities here, we conclude the mental effects of Huntington's disease were sufficiently beyond common knowledge that an expert opinion on the matter would assist the jury in evaluating whether the inability to give legal consent element of count 1 had been met. Thus, Dr. Rosenblatt could (and did) properly (1) opine that Dolores's condition rendered her incapable of understanding the act, nature, and consequences of sexual intercourse, and (2) present facts supporting that opinion.

On the other hand, we agree with defendant that Dr. Rosenblatt's additional testimony that Dolores was incapable of giving "legal consent" was problematic. This testimony sets forth a legal conclusion that the jury could have easily reached on its own by considering the evidence in light of the court's instructions and definition of legal consent. Moreover, even if Dr. Rosenblatt's legal opinion was admissible, there is no indication in the record that Dr. Rosenblatt was familiar with the definition of "legal consent" applicable to this case or was otherwise qualified to render a legal opinion on the matter. However, we find no prejudice.

An abundance of evidence showed Dolores mentally lacked the capacity to consent to sexual intercourse. As defendant acknowledges in his opening brief, the permissible portion of Dr. Rosenblatt's testimony concerning Dolores's impaired ability to understand the nature and consequences of the act of sexual intercourse was sufficient by itself to support a finding by the jury that Dolores was incapable of giving legal consent. Despite Dr. Howsepian's opinion that Dolores had been inadequately assessed,

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[5] The jury was given CALJIC No. 10.02, the standard instruction on section 261, subdivision (a)(1), which was modified, in part, to include the definition of legal consent articulated by the court in *People v. Griffin, supra*, 117 Cal. at page 585.

Dr. Rosenblatt's opinion that Dolores suffered from moderate dementia was corroborated by the testimony of other medical professionals, including Dr. Calmes, who cared for Dolores for around 10 years before she was admitted to the Hospital. Dolores's observed behavior by Hospital staff provided further support for the conclusion that Dolores was mentally deficient to the degree that she would have difficulty appreciating the nature and consequences of sexual intercourse.

Defendant's prejudice argument is essentially that Dr. Rosenblatt's credentials as an expert on Huntington's disease were so "impeccable" the jury likely abandoned its fact-finding role and allowed his opinion to direct its finding that Dolores was incapable of giving legal consent. We disagree. The jury retained its duty to consider all the evidence in determining the existence of every element of the crimes. The court instructed the jury, pursuant to CALJIC No. 2.80, that the opinion expressed by an expert witness "is only as good as the facts and reasons on which it is based," the jury was "not bound by an opinion," and the jury "may disregard any opinion [it] finds … to be unreasonable." The jury is presumed to have followed the trial court's instructions. (*People v. Delgado* (1993) 5 Cal.4th 312, 331.) In light of the foregoing, we conclude it is not reasonably probable a result more favorable to defendant would have occurred in the absence of the expert's testimony. (Cal. Const., art. VI, § 13; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

DISPOSITION

The judgment is affirmed.

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DAWSON, J.

WE CONCUR:

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HARRIS, Acting P.J.

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GOMES, J.